United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2163
76-2164

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

KENNETH SCHAFFER

vs.

CARL ROBINSON

Appeal from the United States District Court

for the District of Connecticut

BRIEF OF THE RESPONDENT-APPELLEE

CARL ROBINSON

Robert E. Beach, Jr.
Assistant State's Attorney
Drawer H, Amity Station
New Haven, Connecticut 06525
(203) 389-6593

TABLE OF CONTENTS

PAGE

I. Statement of Issues and Statement of the Case..... 1

II. Argument

A. The petitioner was arrested pursuant to a valid warrant; and even if the warrant were invalid, the claim does not constitute a ground for relief..... 2

B. The search of the petitioner's motor vehicle may not be a ground for relief.... 4

C. There was no violation of the petitioner's Miranda Rights..... 6

D. There was no error in the District Court's refusal to hold an evidentiary hearing..... 7

E. There was no error in holding that claims of ineffective counsel were not raised in state proceedings..... 8

III. Conclusion..... 9

TABLE OF AUTHORITY

CASES	PAGE
Aguilar v. Texas, 378 U.S. 23 (1964).....	3
Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976).....	4
Caver v. Alabama, 537 F.2d 1333 (5th Cir. 1976).....	3
Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976)....	3
Fisher v. Scafati, 439 F.2d 307 (1st Cir. 1971).....	8
Frisbie v. Collins, 342 U.S. 519 (1952).....	2
Lally v. Warden (No. 202508, Hartford Superior Court, 1977).....	3
Miranda v. Arizona, 384 U.S. 436 (1966).....	6
Picard v. Connor, 404 U.S. 270 (1971).....	8
Pitchess v. Davis, 421 U.S. 482 (1975).....	8
Pulver v. Cunningham, 419 F.Supp. 1221 (S.D.N.Y. 1976)	5
Roach v. Parratt, 541 F.2d 772 (8th Cir. 1976).....	5
Roundtree v. Riddle, 417 F.Supp. 1274 (W.D.Va. 1976)..	2
Schaffer v. Warden, (No's. 188170, 191126 Hartford Superior Court, 1975).....	3
Sinclair v. Turner, 447 F.2d 1158 (9th Cir. 1971).....	7
State v. Licari, 153 Conn. 127 (1965).....	3
State v. Schaffer, 168 Conn. 309 (1975).....	4,5,6
Stone v. Powell, ___ U.S. ___, 49 L.Ed.2d 1067 (1067).....	2,4,5
Texas v. White, 423 U.S. 67 (1975).....	5
Townsend v. Sain, 372 U.S. 293 (1963).....	7

CASES — PAGE

United States ex rel. Fein v. Deegan, 410 F.2d 13 (2d Cir. 1969)..... 7

United States ex rel. Gilliard v. LaVallee, 376 F. Supp. 205 (S.D.N.Y. 1974)..... 7

United States ex rel. Orsini v. Reincke, 286 F.Supp. 974 (D.Conn.)..... 2

United States ex rel. Regina v. LaVallee, 504 F.2d 580 (2d Cir. 1974)..... 7

United States ex rel. Sabella v. Follette, 432 F.2d 572 (2d Cir. 1970)..... 7

STATUTES

Section 54-43 of the Connecticut General Statutes..... 2

28 U.S.C. §2254..... 6,9

I. Statement of Issues and Statement of the Case.

The respondent agrees with the petitioner's statement of issues and statement of the case.

II. Argument.

A. The petitioner was arrested pursuant to a valid warrant; and even if the warrant were invalid, the claim does not constitute a ground for relief.

In the District Court, the petitioner claimed that §54-43 of the Connecticut General Statutes, which concerns bench warrants issued by the Superior Court, is unconstitutional. (A.13). In his return, the respondent claimed that the statute is constitutional and that the issue was not raised in the state courts and therefore ought not to be considered. (A.18-19). See 28 U.S.C. §2254(b). Judge Blumenfeld held that even if the arrest were illegal, the petitioner was not entitled to relief. (A.30). He relied upon Stone v. Powell, ___ U.S. ___, 49 L.Ed.2d 1067 (1976), Frisbie v. Collins, 342 U.S. 519 (1952), and United States ex rel. Orsini v. Reincke, 286 F.Supp. 974 (D.Conn.), aff'd 397 F.2d 977 (2d Cir. 1968).

The respondent urges that Judge Blumenfeld's reliance was well-placed. While the respondent realizes that the results of searches or confessions obtained pursuant to illegal arrests are subject to suppression, no such claim is raised in the instant case. (Petitioner's Brief, p.9). An illegal arrest simply will not void a conviction. Frisbie v. Collins, supra; Roundtree v. Riddle, 417 F.Supp. 1274

(W.D.Va. 1976). In his brief, the petitioner, significantly, does not claim that this issue was raised in the state courts; nor does he claim that the affidavit underlying the warrant was not supported by oath or affirmation. See Lally v. Warden, No. 202508, Superior Court for Hartford County (February 8, 1977) (copy attached). The failure of the petitioner to raise the issue in the state courts, the underlying futility of such a claim had it been raised, and the lack of any prejudice ought to foreclose relief on this issue.

The state court which considered this claim in a habeas corpus action also held that because the issue of the possibly invalid arrest was not raised until long after the trial, it was waived. Schaffer v. Warden, (Nos. 188170 and 191126, Hartford County Superior Court, February 27, 1975) (copy appended) pp.1-2. The state court also noted that the affidavit underlying the warrant fully satisfied the requirements of Aguilas v. Texas, 378 U.S. 23 (1964) and State v. Licari, 153 Conn. 127 (1965). The petitioner does not claim that his warrant was constitutionally defective, but only that the statute concerning bench warrants does not include a comprehensive check-list of constitutional requirements. Where there has in fact been compliance with those requirements, the petitioner would not seem to have harmed in any way. See also Caver v. Alabama, 537 F.2d 1333 (5th Cir. 1976); Chavez

v. Rodriguez, 540 F.2d 500 (10th Cir. 1976); Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976).

B. The Search of the Petitioner's Motor Vehicle May Not Be a Ground for Relief.

The petitioner claims that the seizure of his automobile violated the Fourth Amendment. He raised this claim in the District Court (A.16); the respondent denied the claim (A.21-22), and later raised the defense of Stone v. Powell, supra. (A.23). The rationale of Stone v. Powell, supra, is that the purpose of the exclusionary rule is not well served by the relitigation of Fourth Amendment issues in the District Courts; this rationale would appear to be particulary appropriate in the instant case. While the petitioner claims that there was not a "full and fair review" of the issue, (Petitioner's Brief, p.12), the record belies the petitioner's claim. State v. Schaffer, 168 Conn. 309, 315-16 (1975).

The respondent views Stone v. Powell, supra, somewhat differently from the petitioner. The petitioner apparently claims that Stone requires a balancing test in which the reliability of the evidence is to be weighed against the deterrent effect of the exclusionary rule. The respondent suggests that Stone's holding is more comprehensive. The bottom line of the majority opinion is that "...where the State has provided an opportunity for full and fair litigation of a

Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, supra, at 49 L.Ed.2d 1088. The petitioner's assertion that the evidence educed as a result of the allegedly illegal seizure was inconclusive would appear to be counter-productive: if the evidence wasn't conclusive, then how was he harmed?

The only relevant issue under Stone is whether an appropriate opportunity to have a Fourth Amendment issue litigated was accorded in state courts. Judge Blumenfeld recognized that the petitioner consented to a search of his car and did not challenge a search warrant. See Texas v. White, 423 U.S. 67 (1975). He also implicitly held that the issue had been raised and decided in state courts. (A-31). The respondent also notes that the issue was fully considered by the Connecticut Supreme Court. State v. Schaffer, supra, at 168 Conn. 315-16. See also Roach v. Parratt, 541 F.2d 772, 773 (8th Cir. 1976). "[I]t would appear that an applicant for habeas corpus must demonstrate that the state appellate process was in some equivalent way inadequate to correct errors of the trial court." Pulver v. Cunningham, 419 F.Supp. 1221, 1224 (S.D.N.Y. 1976). The petitioner's claim that the Connecticut Supreme Court failed to follow

Connecticut case law is logically impossible; and the further claim that that court has an allegedly overriding interest in upholding convictions is absurd.

C. There Was No Violation of the Petitioner's Miranda Rights.

The petitioner further claims that his rights under Miranda v. Arizona, 384 U.S. 436 (1966) were violated. His essential claim is that when he voluntarily appeared to identify the body of his wife, he was not given Miranda warnings. The Connecticut Supreme Court held, after a complete recitation of the facts found, that the petitioner was not in any sense in custody at the time the statement was given, and thus Miranda was not applicable. State v. Schaffer, supra, at 168 Conn. 313-14. The District Court added that the statement in question was exculpatory. (A-32). The petitioner now claims that he must have been a suspect: Miranda rights therefore should have been given and in the absence of such a warning the conviction should be overturned.

It seems that the defendant is attempting to reargue factual determinations in which three courts have accorded. No claim has been made that the findings of the Connecticut courts are invalid under 28 U.S.C. §2254(d). See A.32. Further, no claim of prejudice is advanced: the statement in question, that the petitioner said that he saw on the

television news that a woman matching the description of his wife had been found dead, would appear to be rather innocuous and the prejudice is non-existent. See United States ex rel. Sabella v. Follette, 432 F.2d 572 (2d Cir. 1970); United States ex rel. Gilliard v. LaVallee, 376 F.Supp. 205 (S.D. N.Y. 1974); United States ex rel. Fein v. Deegan, 410 F.2d 13, 17 (2d Cir. 1969).

D. There Was No Error in the District Court's Refusal to Hold on Evidentiary Hearing.

Where the complaint and the record indicate that no error of constitutional dimension has occurred, there is no need for a hearing in the District Court. Townsend v. Sain, 372 U.S. 293 (1963). This claim is, of course, clearly related to the issue in Part C. The general rule is that if the state court's facts are sufficient, there is no need for a hearing. The burden is on the applicant to establish the inadequacy of the state factual determination. 28 U.S.C. §§2254(d) and (e). See Sinclair v. Turner, 447 F.2d 1158 (9th Cir. 1971); United States ex rel. Regina v. LaVallee, 504 F.2d 580 (2d Cir. 1974). Here there was a full exploration of the factual matters in the state courts, both in the primary and collateral proceedings. No further hearing would be necessary or warranted.

Further, a certain degree of discretion inheres in the

decision whether to hold a hearing, and a reviewing court must find an abuse of discretion in order to reverse. Fisher v. Scafati, 439 F.2d 307 (1st Cir. 1971). The respondent suggests that no burden has been met.

E. There Was No Error In Holding That Claims of Ineffective Counsel Were Not Raised In State Proceedings.

The petitioner claims in his brief that he was denied effective assistance of counsel in that his court-appointed counsel failed to request a change of venue despite the racial composition of Tolland County. (pp.20-22). In his return, the respondent alleged that this issue was never raised in the state courts. (A.19). Judge Blumenfeld agreed. (A.33).

In his brief, the petitioner claims that his remedies were exhausted because the Superior Court had denied a habeas corpus action and an appeal was denied. (pp.20-21). The difficulty with this statement is that, according to the record, this issue was never raised.

> [I]t is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in state courts and another in the federal courts.
>
> Picard v. Connor, 404 U.S. 270, 275-76 (1971)

See also Pitchess v. Davis, 421 U.S. 482 (1975).

With no showing that 28 U.S.C. §2254(b) has been satisfied, the petitioner is foreclosed from relief in federal courts. There is no allegation that the state courts cannot fairly litigate the claim.

III. Conclusion.

The respondent respectfully requests that the dismissals be affirmed.

THE RESPONDENT

By Robert E. Beach, Jr.

ROBERT E. BEACH, JR.
ASSISTANT STATE'S ATTORNEY
DRAWER H, AMITY STATION
NEW HAVEN, CONNECTICUT 06525

NO. 20 25 08

THOMAS LALLY	:	SUPERIOR COURT
v.	:	
WARDEN	:	
		HARTFORD COUNTY
NO. 20 46 14	:	
PURDY WILLIAMS	:	
v.	:	
WARDEN	:	JANUARY 31, 1977

MEMORANDUM OF DECISION

These are habeas corpus proceedings wherein the plaintiffs allege they were arrested by bench warrants issued under Sec. 54-43 of the General Statutes, that this statute is unconstitutional and therefore that they are being held illegally.

Similar claims were raised in many other dockets. These are listed in the Assignment of Habeas Corpus Matters To be Heard at Connecticut Correctional Institution at Somers, Wednesday, October 27, 1976. It was agreed that whatever ruling is made in the instant cases would also apply to the other dockets so listed.

It is the plaintiffs' claim that Sec. 54-43, which authorizes the issuance of bench warrants, fails to require an oath or affirmation and so is unconstitutional.

This claim goes back to the case of State v. Licari, 153 Conn. 127, which held that where a bench warrant was issued

without any facts supported by oath or affirmation from which the court or judge issuing the warrant could make an independent determination of probable cause, it was fatally defective and that the proceedings against the defendant who was arrested under it should be dismissed.

The information which was so found to be defective is set out in Connecticut Supreme Court Records and Briefs, Vol. A-447, p. 248. The relevant part merely states that the State's Attorney makes information that in New Haven on July 5, 1963, the defendant did violate a statute.

The information presently being used is Form JDSR 409 CCIS 7/70. It states that the State's Attorney applies for a bench warrant and, on his oath of office, complains that he has reasonable ground to believe that the accused did commit the crime specified and charges that the accused did commit the crime specified and "As probable cause for the issuance of said bench warrant said State's Attorney submits herewith the affidavit of" (a named person) and prays that a bench warrant issue.

The plaintiffs point out that Sec. 54-43 since the Licari case has not been amended to require an oath or affirmation. They claim that it originally was defective and that the Supreme Court in the Licari case supplied the omissions in the statute in violation of its authority and power.

Such claim is based on a misreading of the Licari case.

on page 132:

In Licari the court said/ "The provision of the fourth amendment that 'no warrants shall issue, but upon probable cause, supported by oath or affirmation' clearly requires, inter alia,

that a state's attorney applying for a bench warrant submit facts, supported by oath or affirmation, from which the judge or court can make an independent determination that probable cause exists for the issuance of the bench warrant under General Statutes, § 54-43." It also said on page 133, "While, as emphasized in Ker v. California, supra, 34, the states have latitude in developing workable procedures governing arrests, searches and seizures these procedures must conform to fourth amendment requirements. This is true, of course, of proceedings under our bench warrant statute. § 54-43. The bench warrant was issued for the arrest of the defendant upon an information unsupported by oath or affirmation. The warrant failed to conform to federal constitutional requirements as now established for all courts by the United States Supreme Court. Necessarily, it was fatally defective."

Thus the court held that Sec. 54-43 tells how the State's Attorney goes about getting a bench warrant. The court further held that the Fourth Amendment tells what must be in the application the State's Attorney files in requesting that the bench warrant issue. There are no omissions in Sec. 54-43. The Supreme Court read it and the Constitution together. Sec. 54-43 is valid, needs no amendment, and the plaintiffs' claims concerning it have no merit.

The plaintiffs' claims of inadequate representation are based on the premise that Sec. 54-43 is invalid. Because of the court's ruling on Sec. 54-43, it is not necessary to consider this claim.

The writs are dismissed.

NOS. 136170 and 191126

KENNETH SCHAFFER : SUPERIOR COURT

: HARTFORD COUNTY

VS.

THE WARDEN : FEBRUARY 27, 1975

MEMORANDUM OF DECISION

In his brief the petitioner bases this cause of action on four grounds:

The first of these is that he was not arraigned "forthwith." The procedure for an arrest on a bench warrant as prescribed by General Statutes § 54-43 requires that the arresting officer "shall without undue delay" bring such person to a community correctional center. The officer's return reveals that on August 25, 1973, the bench warrant was issued and that he was arrested and presented to the clerk at the correctional center - all on the same date. Moreover, he was arraigned at the next session of the Superior Court, which was August 30, 1972. The element of speedy presentation was therefore satisfied.

The second basis for relief is the claim that the bench warrant was insufficient to confer jurisdiction on the defendant-petitioner. The short answer to this argument is that any such claim is waived by reason of its not having been raised until long after his trial. Thus, the defendant is deemed to have submitted to the court's jurisdiction of his person and also to

have waived any possible defect of the bench warrant. Reed v. Reincke, 155 Conn. 591, 599. While this ruling disposes of this claim, it may be also observed that the affidavit provided in the application for the bench warrant amply satisfies constitutional requirements. Aguilar v. Texas, 378 U.S. 23; State v. Licari, 153 Conn. 127. Thus, the failure to raise this issue in timely fashion would not have affected the result.

The petitioner, as his third ground, claims that the absence of a probable cause hearing or its equivalent did in and of itself cause a failure to confer jurisdiction over him. Again, this claim was not seasonably made. See Reed v. Reincke, supra p. 599. In a case of murder it is the settled law that there is no right to a hearing in probable cause as directed in General Statutes § 54-76a. See State v. Stallings, 154 Conn. 272, 276, and the reasons stated therein. See also Coleman v. Alabama, 389 U.S. 1.

As a final basis for the granting of the writ of habeas corpus, the petitioner asserts that there was a failure to allow him or his counsel disclosure information at the early stages of the proceeding. Actually, this refers to his motion for disclosure, which was confined to merely seeking the names and addresses of witnesses testifying before the Grand Jury. This motion was denied.

The Grand Jury requirement is prescribed by the Connecticut Constitution, Article I, Section 8. Its function is to determine whether there is sufficient evidence to require that

"n person shall be held to answer for any crime." Under our practice, the State's Attorney merely furnishes names of witnesses whom the grand jury may or may not call, at its pleasure. Also, the grand jury may call witnesses other than those offered by the State's Attorney. It is obvious, therefore, that a defendant cannot be provided with a list of witnesses which will necessarily be accurate.

Other circumstances indicate that this denial of the witnesses' names is of little significance. In the first place, the defendant is present at the grand jury session and may thus ascertain their identity. In this case, too, there as a lengthy affidavit submitted on the question of probable cause, which contained the names of potential witnesses. The petitioner's counsel obtained a copy of this affidavit and mailed it to him on August 31, 1972 -- about two months prior to the grand jury session.

In support of this, his final claim, no legal authorities are cited. In the absence of such precedent, and considering that there is no showing of actual prejudice, it is felt that the denial of the motion for disclosure is not a tenable ground on which to base this action of habeas corpus.

The writ of habeas corpus is denied and judgment may enter in favor of the defendant.

ALEXANDER, J.